

EXHIBIT P

IN THE UNITED STATES
PATENT AND TRADEMARK OFFICE

IN RE PATENT ISSUED TO: Morris, et al.
PATENT NO. 6,357,193
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APPLICATION NO.: 09/465,099
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TITLE: Roof Batten
EXAMINER: To be assigned

CERTIFICATE OF MAILING

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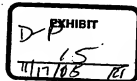
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REQUEST FOR REEXAMINATION
UNDER 35 U.S.C. § 302

Sir:

Pursuant to 35 U.S.C. §§ 301-307 and 37 CFR § 1.510, *et. seq.* (*ex parte* reexamination), reexamination is requested of United States Patent No. 6,357,193, issued on March 19, 2002 to Diversi-Plast Products, Inc. (the "'193 Patent'"), from an application filed on December 16, 1999. The '193 Patent, attached hereto as Appendix A, is still enforceable.



778053v9 34873/0006

Summary

Reexamination of the '193 Patent is respectfully requested on various grounds of anticipation and obviousness, in view of numerous references not cited in the examination of the '193 Patent. Provided below is a table summarizing the substantial new questions of patentability raised by the newly submitted prior art:

<u>Claims</u>	<u>Statutory Basis</u>	<u>Prior Art</u>
<i>Claims 1-4</i>	35 U.S.C. § 102(b)	US 5,617,690 US 5,794,396 GB 2062056
	35 U.S.C. § 103	US 5,304,095 in view of US 5,617,690 US 5,304,095 in view of US 5,794,396 US 5,304,095 in view of GB 2062056
<i>Claims 5-13</i>	35 U.S.C. § 103	US 5,304,095 in view of US 5,617,690 US 5,304,095 in view of US 5,794,396 US 5,304,095 in view of GB 2062056
<i>Claims 14-15</i>	35 U.S.C. § 102(b)	US 5,617,690 US 5,794,396 GB 2062056
	35 U.S.C. § 103	US 5,304,095 in view of US 5,617,690 US 5,304,095 in view of US 5,794,396 US 5,304,095 in view of GB 2062056
<i>Claims 16-20</i>	35 U.S.C. § 103	US 5,304,095 in view of US 5,617,690 US 5,304,095 in view of US 5,794,396 US 5,304,095 in view of GB 2062056
<i>Claim 21</i>	35 U.S.C. § 102(b)	US 5,304,095
	35 U.S.C. § 103	US 5,304,095 view of US 5,469,795 US 5,304,095 view of US 5,509,987
<i>Claim 22</i>	35 U.S.C. § 102(a)	US 5,947,817
	35 U.S.C. § 103	US 5,947,817 in view of US 5,469,795 US 5,947,817 in view of US 5,509,987

I. Reexamination Request**Claims 1-4****35 U.S.C. § 102(b)**

Reexamination is requested of Claims 1-4 pursuant to 35 U.S.C. § 102 in light of the following United States Patents and international patent application, each taken alone:

U.S. Patent No.	Filing Date	Grant Date	Shorthand
No. 5,617,690	1/15/1993	4/8/1997	Gibbs '690
No. 5,794,396	7/30/1996	8/18/1998	Gibbs '396
International Application	Filing Date	Published	Shorthand
GB 2062056	9/24/1980	5/20/1981	Neumann

Each of the above patents or printed publications anticipates Claims 1-4.

35 U.S.C. § 103

Reexamination of Claims 1-4 is also requested pursuant to 35 U.S.C. § 103 in light of U.S. Patent No. 5,304,095 (the "Morris '095"), filed September 24, 1993 and granted April 19, 1994, in view of any of: (i) Neumann; (ii) Gibbs '690; and (iii) Gibbs '396.

The combination of Morris '095 taken with any of the above listed patents or applications, separately or in combination, renders Claims 1-4 obvious.

Claims 5-13**35 U.S.C. § 103**

Reexamination of Claims 5-13 is requested pursuant to 35 U.S.C. § 103 in view of Morris '095, taken with any of (i) Neumann; (ii) Gibbs '690; and (iii) Gibbs '396.

The combination of Morris '095 taken with any of the above listed patents or applications, separately or in combination, renders obvious each of Claims 5-13.

Claims 14-15**35 U.S.C. § 102(b)**

Reexamination is requested of Claims 14-15 pursuant to 35 U.S.C. § 102 in light of any of (i) Neumann; (ii) Gibbs '690; and (iii) Gibbs '396, each taken alone.

35 U.S.C. § 103

Reexamination of Claims 14-15 is also requested pursuant to 35 U.S.C. § 103 in light of Morris '095, in view of any of: (i) Neumann; (ii) Gibbs '690; and (iii) Gibbs '396.

The combination of Morris '095 taken with any of the above listed patents or applications, separately or in combination, renders Claims 14-15 obvious.

Claims 16-20**35 U.S.C. § 103**

Reexamination of Claims 16-20 is requested pursuant to 35 U.S.C. § 103 in light of Morris '095, in view of any of: (i) Neumann; (ii) Gibbs '690; and (iii) Gibbs '396.

The combination of Morris '095 taken with any of the above listed patents or applications, separately or in combination, renders obvious each of Claims 16-20.

Claim 21

35 U.S.C. § 102(b)

Reexamination is requested of Claim 21 pursuant to 35 U.S.C. § 102 in light of Morris '095.

35 U.S.C. § 103

Reexamination of Claim 21 is also requested pursuant to 35 U.S.C. § 103 in light of Morris '095, in view of any of:

U.S. Patent No.	Filing Date	Grant Date	Shorthand
No. 5,469,795	2/17/1994	11/28/1995	Moorman
No. 5,509,987	3/21/1994	4/23/1996	Dahlquist

The combination of Morris '095 taken with either of Moorman or Dahlquist renders Claim 21 obvious.

Claim 22

35 U.S.C. § 102(a)

Reexamination is requested of Claim 22 pursuant to 35 U.S.C. § 102 in light of United States Patent 5,947,817 to Morris, filed on January 2, 1998 and issued on September 7, 1999 (Morris '817), taken alone.

35 U.S.C. § 103

Reexamination of Claim 22 is also requested pursuant to 35 U.S.C. § 103 in light of Morris '817 in view of any of (i) Moorman; and (ii) Dahlquist.

The combination of Morris '817 taken with either of Moorman or Dahlquist renders Claim 22 obvious.

Each of above cited patents and printed publications is listed on enclosed PTO Form 1449. In addition, copies of the above patents and printed publications are enclosed with this request.

II. Overview of the '193 Patent and of the Cited Prior Art

In the typical installation of a tile roof, battens are affixed to a waterproof barrier applied over the roof decking, with tiles then fixed over the battens. If using solid battens fixed directly over the roof overlayment, such as battens constructed of strips of wood, water seeping through the tile can become trapped or dammed behind the battens, leading to rotting of the underlying roof decking and leading to leaks.

This problem has been addressed in the prior art by providing battens with various transverse drainage channels and openings for drainage and air circulation. More than a year before the filing of the application that became the '193 Patent, each of Neumann, Gibbs '690, and Gibbs '396 disclosed roof battens with transverse passages to improve water drainage along the overlayment, and also to provide ventilation under the tiles.

More than year before filing of the application that became the '193 Patent, Morris '095 was issued, which discloses a ventilating roof ridge cap. Additionally, in the year prior to filing the '193 Patent, Morris '817 was issued, also disclosing ridge cap ventilators. The ventilators of Morris '817 were adapted to ventilate moisture and warm air from under a roof.

Although a ridge cap ventilator is used in a different context than a tile-supporting roof batten, the "spacer" of claims 21 and 22 of the '193 Patent encompass the form of ventilators disclosed in Morris '817, as will be discussed in detail below.

In addition, the following United States Patents and international application are provided as relevant in not having been cited in the prosecution of the '193 Patent, and in demonstrating that various cannels, passages and grooves have been commonly employed in the roof batten art to provide increased ventilation and water drainage.

U.S. Patent No.	Filing Date	Grant Date	Shorthand
No. 1,163,034	7/8/1912	12/7/1915	Phippen
No. 4,418,505	1/13/1982	12/6/1983	Thompson
No. 5,777,360	9/7/1994	11/26/1996	Gibbs '360
No. 5,471,807	12/3/1993	12/5/1995	Vasquez

III. Statement regarding Substantial New Question of Patentability

Under 35 U.S.C. § 303, a Request for Reexamination will be granted only if it presents a substantial new question of patentability. Section 303 states: "The existence of a substantial new question of patentability is not precluded by the fact that a patent or printed publication was previously cited by or to the Office or considered by the Office."

During prosecution of the application that matured into the '193 Patent, neither the Office nor Diversi-Plast Products, Inc. (the "Patentee") cited or otherwise identified any of Neumann, Gibbs '690, and Gibbs '396, nor were any of the other enclosed batten references showing the use of transverse passages cited or otherwise identified.

Additionally, the understanding of the art, as shown in Moorman and Dahlquist, regarding stapling and stitching in the production of layered materials of the type disclosed in the '193 Patent, was not reflected in any of the cited prior art.

Because these patents and applications, either alone or taken together with Morris '095 and Morris '817, either anticipate or render obvious every claim of the '193 Patent—as shown in detail in Section V below—they raise a substantial new question of patentability as required by Section 303.

In fact, no references made of record in the prosecution of the '193 Patent disclose a batten having features adapted for ventilation or drainage, even though numerous patents and printed publications exist showing these features. Rather, the references cited in prosecution of the '193 Patent all relate to roof ridge ventilation. This request for the first time provides the Office with proper and analogous batten prior art, missing as a class from the prosecution of the '193 Patent.

The very opportunity to consider for the first time the analogous prior is a substantial new question of patentability. The problem is clear when viewed in context of the Examiner's statement of reasons for indication of allowable subject matter during prosecution of the '193

Patent. The statement is found at the last paragraph on page 3 of the Office Action mailed February 14, 2001 (note that Claims 13 and 26 in the original application issued as Claims 1 and 14 in the '193 Patent):

Regarding claims 13 and 26, prior art fails to disclose a tile roofing system and a method of installing tile on a roof with battens having a multiplicity of passages extending generally transversely to a longitudinal axis of the batten.

The newly cited roof batten prior art provides precisely that which the examiner failed to find in the prior art during prosecution.

As to Morris '095 and Morris '817, while these patents were presented to the Office during prosecution, the Office did not consider either Morris '095 or Morris '817 in combination with any prior art roof battens, nor did the Office notice the equivalence in the prior art of stitching and staples for securing together the layers of the claimed spacers.

Morris '095 and Morris '817 combine with those teachings of the prior art cited in this request to render Claims 21 and 22, respectively, obvious, as shown in detail in Section V below. As such, Morris '095 and Morris '817 each raise a substantial new question of patentability, as required by Section 312, when the respective teachings are considered in view of the newly cited prior art.

IV. Legal Basis Under Which Reexamination is Requested

The Law Regarding Anticipation

Under 35 U.S.C. § 102, a claim is anticipated and invalidated when each and every element of the claimed subject matter is described in a single prior art reference. *Celeritas Technologies, Ltd. v. Rockwell Int'l Corp.*, 150 F.3d 1354, 1361 (Fed. Cir. 1998). The various types of prior art that can be used to anticipate a claim are set forth in § 102. One type of anticipatory prior art is described in § 102 (b) as follows:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States. . .

If the claimed invention is described in a printed publication more than one year prior to the effective filing date of an application, that claim is invalid and unenforceable. Publication or patenting prior to this one-year period preceding the filing date creates an absolute bar against patentability.

Another type of anticipatory prior art is described in § 102(a), as follows:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent. . . .

The Law Regarding Obviousness

Under 35 U.S.C. § 103, a claim may be obvious in light of the prior art and, therefore, invalid "if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made..."

To establish a *prima facie* case of obviousness, the prior art reference must teach or suggest all the claim limitations, and there must be some motivation or suggestion to combine the references. There must be a reasonable expectation of success. See MPEP § 2143, "Establishing a *prima facie* case of obviousness." *see also Graham v. John Deere*, 383 U.S. 1 (1966).

Claim Limitations

The first step in an invalidity analysis is claim construction. *Smithkline Diagnostics, Inc. v. Helena Laboratories Corp.*, 859 F.2d 878, 882 (Fed. Cir. 1988). Claim terms are generally given their ordinary and accustomed meaning. The specification, the prosecution history, and, in some situations, the extrinsic evidence (e.g., dictionaries, expert opinion, statements by the inventors) may confirm the ordinary meaning of a claim term or may provide a special meaning for the claim terms. *See, e.g., Renishaw PLC v. Marposs Societa' per Azioni*, 158 F.3d 1243, 1248 (Fed. Cir. 1998). Therefore, after the ordinary meaning of the claim terms has been determined, the specification and prosecution history should be consulted to determine if the patentee used the term in any manner inconsistent with the ordinary meaning." *See, e.g., Vitronics Corporation v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996).

Most of the terms in Claim 1 have an ordinary and accustomed meaning, so do not require additional interpretation. For instance, the specification describes a "batten" in terms of both appearance, *i.e.*, longitudinal axis, and function, *i.e.*, provides spacing between a roof overlayment and roofing tile. The summary adds that the tiles are fixed on top of the battens, so the battens also have a role in fixing the tiles in place. This is a fairly conventional understanding of the batten, as a series of horizontal strips or tracks that support the application of tile on a roof.

A few terms are unclear in the context of the claim language. The interpretation of these terms is discussed in detail below.

"Batten" and "Spacer"

Battens are generally described in the background of the '193 Patent (column 1, lines 20-28):

Battens are normally placed over the felt paper before tiles are installed. The battens are usually fixed to the roof by fasteners, such as nails or staples, driven through the battens and felt paper and into the roof decking. Battens are typically wood strips and serve to separate the tiles from the overlayment. Separation between tiles and overlayment is necessary to ensure that water infiltrating the tiles onto the felt paper evaporates quickly

Claims 21 and 22 use the term "spacer" to describe an element similar to a batten. As used in the specification, the term "spacer" is generally comparable to the term "batten", *i.e.*, "[r]eferring to FIGS. 2 and 3, exemplary batten (spacer) 30 is depicted" (column 2, lines 64-65). As noted in the "Summary of Invention", a spacer is described as being operatively disposable between a roof decking and an exterior roofing material, and a batten is described similarly, as

operatively disposable between a roof decking and an exterior roofing material. See column 1, lines 63-65 and column 2, lines 17-19.

In each case, batten or spacer, the specification describes the element in terms of its function, *i.e.*, the batten or spacer is the element that is disposed between the "roof decking and an exterior roofing material", per the specification, or overlayment and the tile, as per the claims. The difference between the two terms is that the spacer is defined and claimed as an individual component while the batten is defined and claimed as part of a tile roof system. Therefore, Claims 21 and 22 claim a spacer disposable between roof decking and exterior roof material, which could be used in different applications than a multiplicity of batten strips placed in horizontal rows for use in installing a tile roof.

"Overlayment"

Claim 1 recites "a tile roof system comprising an overlayment...".

The ordinary meaning of overlayment would be a layer placed over another thing or surface. Merriam-Webster online provides the following definition for "overlay":

1 a : to lay or spread over or across : SUPERIMPOSE b : to prepare an overlay for

2 : O~~VER~~LIE 2

The specification describes "overlayment" in the sense of a layer, such as felt (tar) paper, that is attached to the roof decking. This is a very conventional approach to tile roof construction. Battens are typically placed over the felt or paper overlayment and tiles fixed to the battens. Therefore, the term overlayment, as used in the specification, should be interpreted as any material, including but not limited to felt and paper, that is attached to the roof decking prior to installation of the battens.

"Ply"

Claim 1 further recites "...a batten...., the batten comprising at least one layer comprising a generally planar first *ply* and a second *ply*." The term "ply" is not defined in the specification. It is, however, used in describing various parts of battens and spacers shown in the figures.

Ply is defined in Webster's New Collegiate Dictionary as "one of several layers, usually sewn or laminated together." This customary use of the term "ply" suggests that a ply can only be understood in the context of two or more cooperating layers.

The specification uses the term "ply" to describe various portions of a batten or spacer, namely, planar portions (52 and 54 in various drawings), convoluted portions and even short portions perpendicular to the planar portions, *i.e.*, cross plies. The convoluted portions (designated as element 56 in Figure 4) are shown bonded to or otherwise fixed to the planar portions. The summary describes the cooperation of the "first ply and a convoluted second ply cooperating to define the multiplicity of passages".

The discreet transverse portions called "cross plies" (also designated as element 56, seen in Figure 5) extend generally perpendicularly between planar plies. "Ply" or "plies" seems to be used in both a customary sense, as one layer of a plurality of interacting layers, and also in an unconventional sense, in that a ply is not necessarily a continuous material interacting with another. In fact, the plies shown in Figure 5 are not even "layers" in a conventional sense. For

this reason it appears that something more than a dictionary definition is intended for the term "ply," or else the application of the term to the short cross segments in Figure 5 makes no sense.

Based on the specification, where a ply can be both a continuous layer, 52, 54 or 56, and also a series of discreet smaller segments 64 as shown in Figure 5, the term ply describes any segment or layer, whether convoluted and continuous or short and discreet, which cooperates with another segment or layer to define a multiplicity of passages.

"Multiplicity of passages"

The '193 Patent describes "channels" 58 in reference to the figures, while the claims and summary of the invention use the term "passages." These must be viewed as the same. In column 3, lines 14-17, they are described as a "multiplicity of air channels 58."

The passages or channels of the '193 Patent would appear to be any that create transverse drainage or ventilation corridors, as per column 4, lines 29-35:

Channels 58 extend generally perpendicularly, or otherwise transversely, to longitudinal axis 36 of batten 30. As more fully described below, batten 30 is installed in generally horizontal rows on a roof. Channels 58 therefore allow water to drain therethrough, preventing water pooling and enabling air exchange once tiles, or other similar materials, are installed.

"Cooperation of first and second plies"

Another limitation of Claim 1 of the '193 Patent are that the first and second plies cooperate to "define a multiplicity of passages." There is no formal description regarding how the first and second plies cooperate to define the multiplicity of passages in the '193 Patent. The Figures provide examples of planar plies 52 and 54 that are described as cooperating with second ply 56 to define a multiplicity of passages. Figures 4, 5, and 6 show three different combinations of the use of planar, convoluted and cross plies to form passages. Figures 4 and 6 depict plies as distinct layers brought together, while Figure 5 depicts plies differently, where the cross plies that form the "second ply" do not actually constitute a continuous layer, rather, the "plies" of Figure 5 are short spanning segments 64 between the planar plies 52 and 54.

From the various embodiments and lack of formal definition, it would seem that any cooperation of structural components defining a passage or channel fit this limitation, whether the structural components are traditional cooperating layers (plies) or other components (cross members) together forming surfaces defining a passage.

"First plies"

Claim 2 further limits Claim 1, reciting a multiplicity of "cross plies" that extend between the "first plies." Claim 1, however, recites "a generally planar first ply" rather than "first plies." While it is recognized that the scope of a request for reexamination is limited to prior art believed to have a bearing on patentability of a claim—and does not extend to indefiniteness under 35 U.S.C. Section 112—Claim 2 does not have antecedent basis for the limitation "first plies." The meaning of the term "first plies" is unclear and likely renders the claim indefinite under 35 U.S.C. Section 112.

It is noted that in Claim 4 "a pair of first plies" is introduced as a separate limitation. For purposes of this request, then, "first plies" will be interpreted as best as possible in light of the specification, and it will be assumed that it is intended, as for Claim 4, that a limitation to a "pair

of first plies" is intended. Claim 2 may be compared, then, to the prior art on the basis that the "first plies" of claim 2 are the two planar plies depicted in many of the figures of the '193 Patent (designated as 52 and 54 in Figures 4, 5 and 6) between which either the second ply 56 or cross plies 64 are disposed. See also column 3, lines 14-16 and lines 21-23. This interpretation is used in the claim analysis that follows.

"Cross plies"

The "cross plies" in the specification are only discussed in reference to Figure 5, where a "second ply" is depicted with the number 62. This second ply is described as including a multiplicity of cross-plies 64 (column 3, lines 21-25). The further explanation regarding these cross plies discloses that:

Cross-plies 64 extend generally perpendicular (or otherwise transversely) between planar plies 52 and 54. Thus, planar plies 52 and 54 and second ply 62 cooperate to define a multiplicity of channels 58 therebetween.

Claim 2 recites a second ply as "a multiplicity of cross plies extending between the first plies".

The limitation would seem to apply to any cross layer or structural component that is generally perpendicular with respect to a pair of first plies, and that cooperates with that pair of first plies in defining a multiplicity of channels.

"Convolute"

The term "convoluted" is not specifically defined in the specification, other than in reference to certain structures of the figures, namely, convoluted ply 56. In the summary of the invention section of the '193 Patent, in describing the spacer it is stated that "[t]he spacer may further include a generally planar first ply and a convoluted second ply cooperating to define the multiplicity of passages."

Merriam-Webster online provides a definition for "convoluted" as "1 : having convolutions" and "2 : involved, intricate." "Convolutions" is defined as follows:

- 1 : a form or shape that is folded in curved or tortuous windings
- 2 : one of the irregular ridges on the surface of the brain and especially of the cerebrum of higher mammals
- 3 : a complication or intricacy of form, design, or structure

While the convoluted second ply 56 of the '193 Patent is depicted as a corrugated layer, it is not defined that way and it is not clear that the Patentee intended that the limitation be read to be so limited, *i.e.*, restricted to a regularly corrugated layer. Further, the corrugation shown for second ply 56 is not tortuous, irregular, or particularly complicated or intricate in form, design, or structure. It does have curves.

Combining what is left of the ordinary definition for convolution with the examples provided by the description and drawings of the '193 Patent, it would seem that any curved surface or layer would satisfy the limitation for a convoluted second ply.

V. Invalidity of the '193 Patent

The second step in an invalidity analysis based on anticipation is comparing the claimed subject matter to the method or composition described in the prior art, in light of the skill of those of ordinary skill in the art, to determine whether they are identical. *Scripps Clinic & Research Foundation v. Genentech, Inc.*, 927 F.2d 1565, 1576 (Fed. Cir. 1991).

The following is an identification of every claim for which reexamination is requested, accompanied by a detailed explanation of the pertinency and manner of applying the cited prior art to every claim for which reexamination is requested, as required under 37 CFR § 1.510.

1. Invalidity under 35 U.S.C. §102(b) in view of Neumann

Neumann was published as a Great Britain application on May 20, 1981, with a priority to a German application filed April 16, 1981. The '193 Patent was filed December 16, 1999 and claims priority to Provisional Application No. 60/112,597, filed on December 17, 1998. Neumann is therefore available as § 102(b) prior art against the '193 Patent.

Claims 1, 2, 3, 4, 14; and 15 are anticipated by Neumann.

It is clear from the figures and description provided by Neumann that the disclosed lath is intended for use directly on the roof overlayment as for the claimed roof batten. As described on page 1, lines 52 to 55 of Neumann:

The object of the present invention is to provide a roof lath which makes it possible to dispense with the espalier lathing both in those roofs that are equipped with covering boards and roofing felt or paper or plastics sheeting...

Where the '193 Patent makes reference to lathes, it is not what is claimed by Neumann, but rather the prior art lattice structure described by Neumann as "espalier lathing." Neumann describes "espalier lathing" as a solution to drainage adopted by the prior art. This is the same solution as the "lathe-batten systems of the prior art" described by the '193 Patent (Figure 1; column 5, lines 6-9). Both Neumann and the '193 Patent, then, are clear in using the claimed "laths" or "battens," respectively, in the same way, e.g., fixed directly over the roof overlayment and beneath the roof tiles, and as an alternative to the lattice system for providing drainage over the roof surface.

The lath of Neumann is clearly the same as a batten, as claimed in the '193 Patent. The earlier filed priority German application to Neumann, DE 2939730 A1, was titled "Dachlatte." A standard English-German dictionary defines a "dachlatte" as a "roof batten." See <http://dict.tu-chemnitz.de/>.

Numerous embodiments of Neumann anticipate Claim 1 of the '193 Patent. Claim 1 is set forth in the chart below which displays how Neumann meets all the limitations in Claim 1.

Neumann also discloses each limitation of Claims 2-4 and 14-15. Neumann teaches the use of passages formed in the batten from layers and adapted to allow water to drain transversely down along the slope of the roof. Particular note is made of Figures 4, 5, 7, and 8 of Neumann, which show battens with multiple layers.

Additionally, Neumann teaches that the battens may be constructed of multiple layers. In the description found on page 2, lines 55-63, Neumann notes that "the lath can be formed by

short strips fixed transversely to the longitudinal direction at intervals with gaps between them, to a continuous lath".

Additionally, the baseplate 2 shown in Figure 6 is described as being adapted for use with other disclosed battens, particularly with battens depicted in Figures 1 and 2 (page 2, lines 87-89).

The combination of a batten depicted in Figure 1 with the baseplate shown in Figure 6 dramatically replicates, in terms of construction and appearance as well as function, the batten depicted in Figure 5 of the '193 Patent. Of course, similarity in appearance is not a test for, nor a requirement for, anticipation. In this case, numerous other embodiments of Neumann clearly anticipate various of the claims of the '193 Patent, as described in detail below.

Claim 1 in View of Neumann.

CLAIM LIMITATION OF '193

TEACHING IN NEUMANN

A tile roof system comprising

According to the specification, "This invention relates to roofing laths for hanging roof tiles or shingles." (Page 1, lines 1-2; also page 1, lines 59-62, and abstract of patent.)

an overlayment

The specification discloses waterproof felt or sheeting - an overlayment: "The invention further consists, according to another of its aspects, in a roof comprising rafters, waterproof felt or plastics sheeting extending over and between the rafters..." (Page 2, lines 40-43.)

a tile

Tiles are attached to battens of the invention, as noted in the specification: "...laths nailed to the rafters through the felt or sheeting and overlapping tiles or shingles hung on the laths..." (Page 2, lines 43-45.)

a batten

See Figures 1 through 8. From page 1, lines 4-5, for "hanging roof tiles"; also page 1, lines 63-69, "The apertures are preferably situated on the lower face of the roof lath, that is the face which, after the laths have been laid, is towards the rafters or roof boarding, and the apertures simultaneously ensure good ventilation and problem-free drainage away of any water that may penetrate the tiles or shingles."

disposable between the tile and the overlayment

According to page 2, lines 43-45, "the lath is positioned between the tile and the felt or sheeting overlayment."

the batten comprising: at least one layer

Each of the battens of Figures 1 through 8 comprise at least one layer.

comprising a generally planar first ply

Each of the battens of Figures 1 through 8 comprise at least one surface comprising a generally planar first ply. On page 2, lines 55-63, the construction of the batten of Figure 1 is described as comprising an upper surface of a continuous lath to which short strips may be affixed.

and a second ply

See particularly the battens of Figures 1, 2 and 6 show battens formed of a planar upper surface with a layer of material formed vertically beneath the batten that functions as a second ply in extending perpendicular to the first ply and delineating the apertures 1. The description on page 2, lines 55-63 notes that "the lath can be formed by short strips fixed transversely to the longitudinal direction at intervals with gaps between them, to a continuous lath." These strips of material comprise the second ply, in the form of a series of cross plies.

Figures 4, 5, 7 and 8 depict battens with a planar base layer (first ply) with a second ply of material with openings formed

CLAIM LIMITATION OF '193

the first and second plies cooperating to define a multiplicity of passages

TEACHING IN NEUMANN

therein and extending at a right angle to the base layer.

See apertures 1, of any of the Figures, which provide the multiplicity of passages.

In Figures 1, 2 and 6, the vertical structures coordinate with the main body of the batten to define the apertures. Note particularly the teaching noted above from page 2, lines 55-63 regarding the application of the second plies to the first ply to "produce the apertures".

For Figures 4, 5, 7 and 8, the apertures are formed from openings in the vertical structure (second ply) abutting the baseplate, or first ply, thus cooperating to define the passages.

extending generally transversely to a longitudinal axis of the batten

See Figures 1 through 8, where in each case the passages 1 are transverse to the longitudinal axis of the batten.

Claim 2

Claim 2 depends from and, therefore, further limits Claim 1. The additional limitations of Claim 2, namely, a pair of "first plies" and "cross plies" are also disclosed in Neumann, as described below.

Particular note is made of the disclosed construction of the Neumann battens. Neumann teaches at page 2, lines 56-63:

The roofing lath may be of any suitable material, for example wood or plastics. The apertures 1 can be either milled out from the lath, or the lath can be formed by short strips fixed transversely to the longitudinal direction, at intervals with gaps between them, to a continuous lath. The strips then produce the apertures 1 between them.

Also of note are the embodiments shown in Figure 5, 7, and 8, where battens having at least three planar sections are disclosed, a baseplate (first ply), at least one vertical section (second ply) at right angles to the baseplate, and a third planar section (further first ply) either parallel to the baseplate (Figures 7 and 8) or at an angle to the baseplate (Figure 5).

Claim 2 in view of Neumann

CLAIM LIMITATION OF '193

The batten of claim 1

in which the second ply includes

a multiplicity of cross plies

extending between the first plies

TEACHING IN REFERENCE

See analysis of batten in claim 1, above.

See analysis of second ply above.

See cross plies of Figure 1, which are the portions of the batten that extend downwardly from the rectangular upper surface (generally planar first ply) and between the apertures 1. In addition, at page 2, lines 59-62 the patentee states, in describing construction of the lath of Figure 1: "...the lath can be formed by short strips fixed transversely to the longitudinal direction, at intervals with gaps between them..." These transverse short strips are cross plies identical in appearance and function to the cross plies depicted in Figure 5 of the '193 Patent.

Alternatively, Figures 2 and 6 show structural components formed vertically beneath the batten upper surface that are separated by apertures 1, the apertures delineating the structure into a multiplicity of cross plies.

Finally, note the structure in Figures 5 and 7, where apertures 1 are formed in the vertical structure spanning the baseplate 2 and the upper planar surface of the batten; these apertures are formed between alternating vertical structural components, forming a multiplicity of alternating cross plies and apertures

The paragraph starting at page 2, line 14, describes a baseplate for use with laths of the invention. See baseplate 2 of Figure 6. The description of Figure 6 provides that the baseplate may also be used with a lath according to either of Figure 1 or Figure 2. (See page 2, lines 87-89). In the embodiment in which the lath of Figure 1 includes a baseplate, the cross plies would extend between two first plies: the rectangular upper face of the lath (a first ply) and the planar baseplate (another first ply).

Figures 2 (as applied to a baseplate) and 6 also show embodiments where the baseplate forms another first ply.

Alternatively, note in Figures 5 and 7 that the vertical structure spans a baseplate 2 and an separate planar surface of the batten, the first and second plies.

Claim 3

Claim 3 depends from Claim 1, with an additional limitation that the "second ply is generally convoluted". The meaning of this limitation is discussed fully above.

Convoluted of the second ply is also present in Neumann, with particular reference to the curved surfaces of the apertures 1 found in Figures 2 through 6.

In fact, the apertures formed in the embodiment shown in Figure 2 of Neumann show a greater intricacy and irregularity than the convoluted second ply 56 depicted in the figures of the '193 Patent.

Claim 3 in view of Neumann

CLAIM LIMITATION OF '193

TEACHING IN REFERENCE

The batten of claim 1

See analysis of batten in claim 1, above.

in which the second ply is

See analysis of second ply above.

generally convoluted

See Figures 2 through 6, each showing curved apertures; in particular Figure 2, which includes a second ply forming an intricate series of transverse apertures through the batten.

Claim 4

Claim 4 depends from Claim 3, with the addition of specifying "a pair of first plies is present".

The definition of ply is provided above. The '193 Patent designates plies 52 and 54 as the pair of plies in the disclosed battens.

Claim 4 in view of Neumann

CLAIM LIMITATION OF '193

TEACHING IN REFERENCE

The batten of claim 3

See analysis of batten in claim 3, above.

in which a pair of first plies is present.

See analysis of the limitation to "first plies" provided for Claim 2, above.

Claim 14

Claim 14 is also anticipated by Neumann, taken alone. The claim limitations of claim 14 are given their ordinary and accustomed meaning.

The meaning of the terms "ply", "batten" and "multiplicity of passages" are discussed in the context of Claim 1, above. Claim 14 is set forth in the chart below, with an explanation of how Neumann meets all the recited features of Claim 14.

Claim 14 differs from Claim 1 in claiming a method of installing a tile on a roof with a slope. This is an inherent feature common to the use of all roof battens. Also inherent are the claimed limitations of providing first and second battens, fixing the first and second battens on the roof such that longitudinal axes of the first and second battens are generally parallel and extend generally horizontally to the roof slope, and fixing tiles atop the first and second battens. These limitations merely note a method of using roof battens practiced commonly with each of the references cited in this request.

Claim 14 in View of Neumann

CLAIM LIMITATION OF '193

TEACHING IN REFERENCE

A method of installing a tile on a roof with a slope comprising the steps of:

Page 2, lines 40-48 describes "a roof comprising rafters, waterproof felt or plastics sheeting extending over and between the rafters, laths nailed to the rafters through the felt or sheeting and overlapping tiles or shingles hung on the lath, wherein each lath has transverse apertures though it at intervals to allow roof ventilation and to allow water to drain away." Because water is able to drain away from the roof through apertures in the lath, the roof at issue must be sloping.

providing first and second battens, each batten comprising

The roof described in Neumann at page 2, lines 40-48 describes *laths* nailed to the rafters..."

first and second plies defining a multiplicity of air passages therethrough

See Figures 1 and 7. In describing Figure 1, the specification notes: "...the lath can be formed by short strips fixed transversely to the longitudinal direction, at intervals with gaps between them, to a continuous lath. The strips then produce the apertures 1 between them." See page 2, lines 59-63. The continuous lath is the first ply, and the short strips are the second ply. The apertures 1 correspond to the multiplicity of air passages.

In Figure 7 the apertures 1 are formed from vertical structure spanning the baseplate 2 and the upper planar surface of the batten; the vertical structure (second ply) defining the apertures 1.

the passages extending generally transversely to a longitudinal axis of the batten;

See any of the figures of Neumann and the apertures 1 in which the passages defined by the apertures 1 are perpendicular to the longitudinal axis of the batten.

fixing the first and second battens on the roof;

Neumann describes a roof comprised of rafters and a waterproof felt or plastics sheeting in which laths are fixed to the roof by nailing to the rafters through the felt or sheeting. See page 2, lines 41-44.

such that longitudinal axes of the first and second battens are generally parallel and extend generally horizontally to the roof slope; and

On page 2, lines 44-45, Neumann describes laths nailed to rafters and "overlapping tiles on shingles hung on the laths." In addition, each lath has transverse apertures through it at intervals to allow water to drain away. The required horizontal and

CLAIM LIMITATION OF '193

TEACHING IN REFERENCE

parallel positioning of the first and second battens is inherent in this description. First, battens must be generally parallel in order to accommodate overlapping tiles. In addition, Neumann discusses horizontal roof lathing, in general, on which tiles or shingles are hung (see page 1, lines 13-14) and notes that the roof laths of the invention are of any form that "permits the roofing tiles to be hung safely in accordance with the usual rules." (See page 1, lines 82-84.) The usual rules involve fixing battens horizontally to the roof slope.

fixing the tile atop the first and second battens. According to page 2, lines 44-45, overlapping tiles are hung on battens.

Claim 15

Claim 15 introduces limitations to both a pair of planar plies and a convoluted ply between the planar first and second plies. The meaning of the term "convoluted" is discussed above for Claim 3. The ordinary definition for convolution encompasses any of intricate, irregular or curved layers or materials.

Claim 15 presents a problem with claim interpretation from lack of antecedent basis and clarity, much as was the case for Claim 2. While Claim 14 provides that first and second plies themselves define a multiplicity of air passages through the batten, suggesting a combination of plies much as provided for Claim 1, Claim 15 introduces "a generally convoluted ply disposed between the first and second plies," which are now "generally planar." It is, of course, impossible for a pair of "planar" plies to form a multiplicity of passages, as do the first and second plies of Claim 14. Claim 15, in reciting that these plies be planar, confuses the understanding of Claim 14.

If the understanding of the interaction of first and second plies in Claim 14 prevails, then it is a difficult to understand the contribution of the convoluted ply in Claim 15, where Claim 14 has already introduced a pair of plies, first and second, that form a multiplicity of air passages through the batten.

To understand Claim 15, the limitation of first and second planar plies of Claim 15 must be read as a negation of the first and second plies forming a multiplicity of passages of Claim 14. Either one of the plies of Claim 14 has been converted to a planar ply to allow the introduction of a convoluted ply between planar plies, or, the convoluted ply of Claim 15 is really one of the first and second plies introduced in Claim 14.

In either interpretation, Neumann anticipates Claim 15. For purposes of this request, it is considered that the first and second plies of Claim 15 are equivalent to the pair of first plies of Claim 2, with the convoluted ply of Claim 15 the same as the convoluted second ply of Claim 3.

Claim 15 in view of Neumann

CLAIM LIMITATION OF '193

TEACHING IN REFERENCE

The method of claim 14

See analysis of batten in claim 14, above.

in which the layer comprises a first and second generally planar ply

See the general analysis of the "first plies" provide in Claim 2, above, only now reinterpreted, as indicated directly above, to allow planar first and second plies. Reference to the embodiments of Figure 2 (as combined with the baseplate of Figure 6), Figure 5 and Figure 6 each clearly show two "planar" plies in conjunction with a curved intermediary ply.

and a generally convoluted ply disposed between the first and second plies.

See discussion of the convoluted second ply provide for Claim 3, above. Figure 2 (as combined with the baseplate of Figure 6), Figure 5 and Figure 6 each have curved apertures.

2. Invalidity under 35 U.S.C. §102(b) in view of either of Gibbs '690 and Gibbs '396

Gibbs '690 was filed on January 15, 1993 and issued on April 8, 1997. Gibbs '396 was filed on July 30, 1996, and issued August 18, 1998.

The '193 Patent was filed December 16, 1999 and claims priority to Provisional Application No. 60/112,597, filed on December 17, 1998. Therefore, both Gibbs '690 and Gibbs '396 are available as § 102(b) prior art against the '193 Patent.

Claims 1-4 and 14-15 are anticipated by Gibbs '690, or, alternatively, by Gibbs '396. Both of the Gibbs patents describe roof mounting assemblies for mounting tile over roof decking. Both patents disclose that the decking may be overlaid with a felt material. Both patents disclose the use of horizontal tracks for mounting the tiles. The horizontal mounting tracks of Gibbs '690 are clearly the same as the battens of the '193 Patent, as the tracks of Gibbs '690 are disposed between the "roof decking and an exterior roofing material", as per the specification of the '193 Patent, or, in the language of Claim 1, between the overlayment and the tile. Similar to Gibbs '690, Gibbs '396 also discloses that the tracks may be used as an intermediary between the roofing tiles and an overlayment (note that Gibbs '360, incorporated by reference at column 4, lines 43-47, provides a detailed description of use of the tracks with roof decking having a felt overlayment).

In '690 "weep holes" are provided for water drainage (Figures 5, 6, 10, 11 and 12). In Gibbs '396, drain holes 36 are provided (see Figures 1 and 17). In each case the holes are formed in an intermediate layer of the batten and provide drainage of water in a direction along the slope of the roof, or transverse to the axis of the batten.

Claim 1

The limitations of Claim 1 were interpreted, above, in the discussion of Neumann. The chart below shows how Gibbs '690 meets all of the limitation of Claim 1, and, therefore, anticipates Claim 1.

Claim 1 in view of Gibbs '690

CLAIM LIMITATION OF '193

TEACHING IN GIBBS '690 REFERENCE

A tile roof system, comprising

A panel mounting assembly for applying roofing material, including shingles, tiles and slate pieces to a roof deck. See column 1, lines 22-24; column 3, lines 29-30.

an overlayment

Support deck, which includes roof decking and any other surface which could be a substrate for the mounting track. See column 3, lines 34-40; column 4, lines 33-39.

a tile

Panels include shingles and tiles. See column 3, lines 29-30.

a batten

The mounting tracks 58 of Figure 11 and 66 of Figure 12 are battens, as they both serve as a spacer between the tile and the overlayment. See column 3, lines 41-44.

disposable between the tile and the overlayment

The mounting track 66 is defined as "a horizontal band, ridge, wire, extrusion, ribbon, or other form, of whatever material, attached to the deck and to which the panel (tile) is attached..." See column 3, lines 41-44.

the batten comprising: at least one layer

See Figures 11 and 12. The mounting track 58 of Figure 11 includes a base 62 connected to offset 64 with "weep holes" in the connecting portion. See also column 5, lines 14-16.

The mounting track 66 of Figure 12 includes a layer comprising a backbone 76 and arcuate ribs extending from the backbone 76 to a base 70. See also column 5, lines 16-19.

comprising a generally planar first ply

The mounting track 58 of Figure 11 has a generally planar first ply 62.

The mounting track 66 of Figure 12 has a generally planar first ply 76.

and a second ply

The mounting track 58 of Figure 11 has a second ply, the "connecting portion" between base 62 and offset 64.

The mounting track of Figure 12 has a second ply, a series of cross plies forming the arcuate ribs 78.

the first and second plies cooperating to define a multiplicity of passages

See Claim 13: "said mounting track being made of a one-piece member comprising said base portion having a bent transition portion which terminates in said offset portion, said base portion being generally parallel to said offset portion, and drain holes being in said transition portion". In Figure 11 holes are shown in the transition or connecting portion that terminate at the base 62, also described as "weep holes" (column 5, lines 14-19).

CLAIM LIMITATION OF '193

TEACHING IN GIBBS '690 REFERENCE

Figure 12 shows first ply 76 and arcuate ribs 78 forming a multiplicity of relatively large drain holes.

extending generally transversely to a longitudinal axis of the batten

As shown in Figures 11 and 12, the drain or weep holes are transverse to the longitudinal axis of the mounting track 66.

Claim 1 in view of Gibbs '396

A similar analysis can be performed for Gibbs '396, where the track 14 of the '396 patent is identical in structure and use to the track 58 of Gibbs '690, similarly demonstrating the use of a batten as an intermediary between the roofing tiles and an overlayment (note that Gibbs '360, incorporated by reference at column 4, lines 43-47, provides a detailed description of use of the tracks with roof decking having a felt overlayment; also column 4, lines 18-25; and also column 12, lines 40-45). The tracks have a plurality of drain holes 36 formed between the base 30 and the upper portion 32 spaced from the base by an intermediate portion 34. (See Figure 17; column 5, lines 22-25). In the language of the '193 Patent, these are the pair of first plies and second ply. The drain holes 36 in the track 14 of Gibbs '396 are formed adjacent the base, or first ply, and otherwise in the intermediate portion, or second ply.

Claim 2

The issues of claim interpretation for Claim 2, in particular the meaning of a pair of first plies, is discussed above.

Gibbs '396 disclose each and every limitation of Claim 1, as shown above. The limitations of Claim 2 are also anticipated by Gibbs '690.

Claim 2 in view of Gibbs '690

CLAIM LIMITATION OF '193

The batten of claim 1
in which the second ply includes
a multiplicity of cross plies

extending between the first plies

TEACHING IN GIBBS '690 REFERENCE

See analysis of Claim 1 in view of Gibbs, above.

See analysis of Claim 1 in view of Gibbs, above.

See Figure 11 with a series of structural cross members between the weep holes 60 connecting the base 62 and offset 64.

See Figure 12 and the portion of three ribs 78 that extend down toward base 70, and comprise cross plies.

See the first plies of Figure 11, the base 62 and offset 64, and Figure 12, the backbone 76 and base 70.

For both Figure 11 and Figure 12, the cross plies extend between and connect the first plies.

Claim 2 in view of Gibbs '396

A similar analysis can be performed for Gibbs '396, where the track 14 (Figure 17) of the '396 patent is identical in structure and function to the track 58 of Figure 11 in Gibbs '690.

Claim 3

The issues of claim interpretation for Claim 3, in particular the meaning of the term "convoluted", is discussed above.

Figure 12 of Gibbs '690 discloses arcuate (curved convoluted) ribs. As discussed above, each and every limitation of Claim 1 is also present. Claim 3 is anticipated by Gibbs '690.

Claim 3 in view of Gibbs '690

CLAIM LIMITATION OF '193

The batten of claim 1
in which the second ply is
generally convoluted

TEACHING IN GIBBS '690 REFERENCE

See analysis of batten in Claim 1, above.

See analysis of second ply for Claim 1, above.

See Figure 12 showing curved arcuate ribs 78.

Claim 3 in view of Gibbs '396

For Gibbs '396, track 14 (Figure 17) provides the requisite curved or convoluted structure, with rounded holes.

Claim 4

Claim 4 depends from Claim 3, with the addition of specifying "a pair of first plies is present".

The definition of ply is provided above.

Claim 4 in view of Gibbs '690

CLAIM LIMITATION OF '193

TEACHING IN GIBBS '690 REFERENCE

The batten of claim 3

See analysis of batten in claim 3, above.

in which a pair of first plies is present.

See analysis of the limitation to "first plies" provided for Claim 2, above.

Claim 4 in view of Gibbs '396

For Gibbs '396, track 14 (Figure 17) provides convoluted second ply, as per Claim 3, and the pair of first plies, as per Claim 2.

Claim 14

Gibbs '690 meets each and every limitation of Claim 14, and, therefore, anticipates and invalidates Claim 14.

The limitations of claim 14 relating to a method of installing a tile on a roof with a slope comprising are common to all tile placement systems using a batten, and are found in Gibbs '690.

Claim 14 in view of Gibbs '690

CLAIM LIMITATION OF '193 **TEACHING IN GIBBS '690 REFERENCE**

A method of installing a tile on a roof with a slope comprising the steps of:

A method for applying panels, including tiles, to cover a roof deck. See "Background of Invention" section. Figures 1-5 show the general roof mounting assembly in which tiles are installed on a sloping roof. Specifically, Figures 2 and 3 show the roof deck 14 as sloping. Figures 6-40 show various embodiments of mounting tracks and other components to be used in the general mounting assembly shown in Figures 1-5.

providing first and second battens, each batten comprising

First and second mounting tracks 12, which comprise battens, are shown in Figure 2. (The other figures, including Figures 11 and 12, show different embodiments of the mounting track shown in Figure 2.)

first and second plies defining a multiplicity of air passages therethrough

The mounting track 58 of Figure 11 has a generally planar first ply 62 and a second ply, the "connecting portion" between base 62 and offset 64, with holes 11 in the connecting portion terminating at the base 62.

Figure 12 shows first ply 76 and a second ply consisting of the portions of the ribs 78 that extend from the first ply toward the base 70. Together, these first and second plies define several air passages (or weep holes) through the first and second plies.

the passages extending generally transversely to a longitudinal axis of the batten;

In Figures 11 and 12 the passages are perpendicular, or transverse, to the longitudinal axis of the battens.

fixing the first and second battens on the roof;

Figures 1-2 shows that the mounting tracks 12 are secured in parallel to a roof decking 14, in the usual manner for tile roof installation.

such that longitudinal axes of the first and second battens are generally parallel and extend generally horizontally to the roof slope; and

Figures 1-2 show the mounting tracks 12 as generally parallel and extending generally horizontally to the slope of the roof deck 14. Figures 1-5 are described in the specification as illustrating several parallel mounting tracks 12 mounted to a support deck 14. See column 4, lines 6-8.

fixing the tile atop the first and second battens.

Figures 1-5 shows a tile 28, secured atop first and second battens 12.

Claim 14 in view of Gibbs '396

A similar analysis can be performed for Gibbs '396. Figures 1 and 2 of Gibbs '396 demonstrate the method of installing a tile on a roof with a slope (column 4, lines 30-36) by the use of first and second battens with longitudinal axes generally parallel and extend generally and horizontal to the roof slope (Figures 1 and 2). Figures 1 and 2 also show disclose the feature of fixing tile atop the first and second battens.

Claim 15

Gibbs '690 anticipates Claim 15. For purposes of this request, it is considered that the first and second plies of Claim 15 are equivalent to the pair of first plies of Claim 2, with the convoluted ply of Claim 15 the same as the convoluted second ply of Claim 3.

Claim 15 in view of Gibbs '690

CLAIM LIMITATION OF '193

TEACHING IN GIBBS '690 REFERENCE

The method of claim 14

See analysis of batten in claim 14, above.

in which the layer comprises a first and second generally planar ply

See the general analysis of the "first plies" provide in Claim 2, above, now planar first and second plies. Reference is made to the embodiment of Figure 12, clearly showing two "planar" plies in conjunction with arcuate ribs 78.

and a generally convoluted ply disposed between the first and second plies.

See discussion of the convoluted second ply provide for Claim 3, above, as to arcuate ribs 78.

Claim 15 in view of Gibbs '396

For Gibbs '396, track 14 (Figure 17) provides the requisite curved or convoluted structure, having rounded holes 36 formed in the intermediate portion 34 (convoluted ply).

3. Invalidity under 35 U.S.C. §103 in View of Morris '095 taken with any of Neumann, Gibbs '690, and Gibbs '396

Morris '095 was filed on September 24, 1993 and issued on April 19, 1994. The '193 Patent was filed December 16, 1999 and claims priority to Provisional Application No. 60/112,597, filed on December 17, 1998. Therefore, Morris '095 is available as § 102(b) prior art against the '193 Patent.

Morris '095 and the '193 Patent have the same inventor, and disclose very similar technology for producing roofing construction material. The patents share many figures and use common terminology, and common citations to the art, in describing the structure and construction of multi-ply roofing materials.

Morris '095 discloses roof ventilators that are constructed of layers of plies, including first and second plies with convoluted intermediate plies. The products described in Morris '095 are identical in construction to those in the '193 Patent. They differ in that the '193 Patent cuts the final product into strips for use as a roof batten, whereas Morris '095 leaves a backing connecting adjacent strips for use as a ridge cap ventilator. In one sense, the battens of the '193 Patent can be seen as detached ventilator sections 12 and 14 of Morris '095.

Claim 1

Claim 1 is obvious under 35 U.S.C. § 103, in light of Morris '095, taken in view of any of: (i) Neumann; (ii) Gibbs '690; and (iii) Gibbs '396.

Claim 1 is anticipated by each of Neumann, Gibbs '690, and Gibbs '396, as discussed above. Claim 1 is, alternatively, obvious in light of Morris '095, taken with any of the anticipatory references.

Each of the limitations found in Claim 1 can be found in Morris '095, except for the use of the structures as roof battens. The pair of first plies of the '193 Patent are the same as the generally planar spaced-apart liners or plies 30, 32 of Morris '095. The generally convoluted second ply is the convoluted intermediate ply 34 of Morris '095.

It is clear that Morris '095 and the '193 Patent have a common construction, sharing the manner in which the first and second plies cooperate to define a multiplicity of passages extending generally transversely to a longitudinal axis, and even sharing the aspect of a multiplicity of cross plies extending between the first plies is. In fact, many of the figures used in describing these features for the batten of the '193 Patent are taken from figures in Morris '095 describing the construction of sections 12 and 14 of the roof ventilator.

Neumann, Gibbs '690 and Gibbs '396 are generally discussed above. Those aspects of Claim 1 relating to a tile roof system comprising an overlayment, a tile and a batten disposable between the tile and the overlayment are all provided by any of Neumann, Gibbs '690, and Gibbs '396, as discussed particularly above.

The motivation to use the roof structures of Morris '095 as a roof batten is found in those portions of Neumann, Gibbs '690 and Gibbs '396 describing the advantages of the battens, in particular, highlight the features of forming transverse channels in a roof batten to allow draining of water and ventilation of moisture under the roof tiles. Page 1, lines 59-62 of Neumann characterize the advantage as:

According to this invention, a roofing lath for hanging roof tiles or shingles has transverse apertures through it at intervals to allow roof ventilation and to allow water to drain away.

For Gibbs '690, weep holes are provided to provide water drainage for numerous of the batten embodiments disclosed therein (Figures 5, 6, 10, 11 and 12). In Gibbs '396, drain holes 36 are provided (see Figures 1 and 17).

Morris '095 describes "ridge cap roof ventilators" having air spaces for ventilation, as transverse apertures. At the time of the filing of the '193 Patent, it would have been obvious to one skilled in the art that the advantages and material used for the roof ventilators of Morris '095 could be used for a roof batten system as disclosed in any of Neumann, Gibbs '690 or Gibbs '396, and that the section 12 and 14 of the roof ventilator of Morris '095 could be detached and used successfully as battens, given the similarity in structure and function to the Neumann and Gibbs battens.

Claim 2

Claim 2 is obvious under 35 U.S.C. § 103, in light of Morris '095, taken in view of any of: (i) Neumann; (ii) Gibbs '690; and (iii) Gibbs '396.

Each of Neumann, Gibbs '690, and Gibbs '396 provide motivation to adapt the ventilator sections 12 and 14 of the roof ventilator of Morris '095 for use as battens, given the similarity in structure and function to the prior art battens having similarly placed transverse drainage channels. Claimed "cross plies" are provided by each of the battens of the prior art, and

identically formed cross plies are disclosed in Morris '095. It would have been obvious to one of skill in the art that the batten systems of any of Neumann, Gibbs '690, or Gibbs '396 could be successfully modified by adapting section 12 and 14 of the roof ventilator of Morris '095 for use as roof battens, given the success of the prior art battens and the similar structure and function of the channels in Morris '095.

Claim 3

Claim 3 is obvious under 35 U.S.C. § 103, in light of Morris '095, taken in view of any of: (i) Neumann; (ii) Gibbs '690; and (iii) Gibbs '396.

Each of Neumann, Gibbs '690 and Gibbs '396 disclose convoluted drainage channels. Those skilled the art would recognize that the similar structures of the roof ventilators of Morris '095 could be used as battens, given the success in the prior art battens in using ventilated battens having such drainage systems to provide transverse drainage along the roof overlayment.

Claim 4

Claim 4 is obvious under 35 U.S.C. § 103, in light of Morris '095, taken in view of any of: (i) Neumann; (ii) Gibbs '690; and (iii) Gibbs '396.

Neumann, Gibbs '690, and Gibbs '396 each disclose battens with multiple plies or layers, providing the functions of both structural support and drainage. In each case the very similar structure and use of the battens to the ventilator sections 12 and 14 of the roof ventilator of Morris '095 provides ample motivation and reason to expect success in adapting the segments of the Morris '095 roof ventilator for use as roof battens.

Claims 5-13

Claims 5-13 are obvious in light of Morris '095, taken in view of any of: (i) Neumann; (ii) Gibbs '690; and (iii) Gibbs '396.

Many of the terms in the claims have been interpreted in the discussion of above. Remaining limitations of Claims 5-13 may be given their ordinary and accustomed meaning.

Claim 5-13 each depend, either directly or indirectly, from Claim 4. Claim 4 is anticipated by each of Neumann, Gibbs '690 and Gibbs '396, as discussed above. Each of the additional elements recited by Claims 5-13 are disclosed in Morris '095.

Each of Neumann, Gibbs '690 and Gibbs '396 provide the motivation to adapt the features of the roof ventilator of Morris '095 to a roof batten. Each of Neumann, Gibbs '690 and Gibbs '396 disclose a roof batten having transverse channels formed in a region intermediate to support or surface layers of the batten to provide water drainage and ventilation.

Morris '095 discloses a ventilator for use with a ridge cap, with transversely aligned ventilation channels. The ridge cap roof ventilators of Morris '095 are virtually identical in construction to the battens of the '193 Patent, with the two patents even referencing the same prior art patents for details of manufacture (see teachings below). At the time of the filing of the '193 Patent, it would have been obvious to one skilled in the art that separated sections 12 and 14 of the roof ventilator of Morris '095 could be used as roof battens, given the similarity in structure and function to the prior art battens showing transverse drainage.

The prior art battens provided the requisite expectation that the resulting battens would be successful for providing drainage and ventilation along the roof, given the teaching in Neumann, Gibbs '690 and Gibbs '396 that transverse drainage and ventilation along such channels is desirable in roof battens.

The following charts detail where additional limitations of Claims 5-13 are found in Morris '095.

Claim 5 in light of Morris '095 in view of any of Neumann, Gibbs '690 and Gibbs '396

CLAIM LIMITATION OF '193

TEACHING IN REFERENCE

plurality of layers

"a plurality of equal width and length panels are placed in parallel and aligned stacked relationship with one another"; column 3, lines 18-21 (Morris '095)

Claim 6 in light of Morris '095 in view of any of Neumann, Gibbs '690 and Gibbs '396

CLAIM LIMITATION OF '193

TEACHING IN REFERENCE

adjacent layers are hingably connected by a hingeline extending generally parallel to a batten longitudinal axis

"The vent parts 12, 14 of the roof ventilator 10 may be fabricated from pleated or hingedly interconnected rectangular panels having equal or progressive widths using either a "slit-scored" or "nick-scored" technique as discussed in Fitterman '813 and Kasner '041 patents"; column 3, lines 13-18 (Morris '095)

Claim 7 in light of Morris '095 in view of any of Neumann, Gibbs '690 and Gibbs '396

CLAIM LIMITATION OF '193

TEACHING IN REFERENCE

hingeline is defined by a slice extending through the second ply and one of the first plies

"The vent parts 12, 14 of the roof ventilator 10 may be fabricated from pleated or hingedly interconnected rectangular panels having equal or progressive widths using either a "slit-scored" or "nick-scored" technique as discussed in Fitterman '813 and Kasner '041 patents"; column 3, lines 13-18 (Morris '095)

("The slit-scoring technique is described in U.S. Pat. No. 4,803,813, issued to Fitterman on Feb. 14, 1989" column 3, lines 64-65 ('193 Patent))

Claim 8 in light of Morris '095 in view of any of Neumann, Gibbs '690 and Gibbs '396

CLAIM LIMITATION OF '193

TEACHING IN REFERENCE

first and second hingelines are present, the first hingeline defined by a first slice extending through one of the first plies and the second ply, and the second hingeline defined by a second slice extending through the other of the first plies and the second ply

"The vent parts 12, 14 of the roof ventilator 10 may be fabricated from pleated or hinged interconnected rectangular panels having equal or progressive widths using either a "slit-scored" or "nick-scored" technique as discussed in Fitterman '813 and Kasner '041 patents"; column 3, lines 13-18 (Morris '095)

("The slit-scoring technique" is described in U.S. Pat. No. 4,803,813, issued to Fitterman on Feb. 14, 1989" column 3, lines 64-65 ('193 Patent))

Claim 9 in light of Morris '095 in view of any of Neumann, Gibbs '690 and Gibbs '396

CLAIM LIMITATION OF '193

TEACHING IN REFERENCE

hingeline is defined by alternate severed and intact portions, the severed portions comprising substantially severed first and second plies, the intact portions comprising substantially intact first and second plies"

"The vent parts 12, 14 of the roof ventilator 10 may be fabricated from pleated or hinged interconnected rectangular panels having equal or progressive widths using either a "slit-scored" or "nick-scored" technique as discussed in Fitterman '813 and Kasner '041 patents"; column 3, lines 13-18 (Morris '095)

("The slit-scoring technique is described in U.S. Pat. No. 4,803,813, issued to Fitterman on Feb. 14, 1989" column 3, lines 64-65 ('193 Patent))

Claim 10 in light of Morris '095 in view of any of Neumann, Gibbs '690 and Gibbs '396

CLAIM LIMITATION OF '193

TEACHING IN REFERENCE

the layers are stacked and fastened together

See Figures 5 and 6 in which layers of vent part 12 are fastened together by fastener 38 (Morris '095)

Claim 11 in light of Morris '095 in view of any of Neumann, Gibbs '690 and Gibbs '396

CLAIM LIMITATION OF '193

TEACHING IN REFERENCE

means for fastening the layers together "stacked relationship with one another and fastened together and to the top panel 62 using a plurality of fasteners 38 such as staples" column 3, lines 20-22 (Morris '095)

Claim 12 in light of Morris '095 in view of any of Neumann, Gibbs '690 and Gibbs '396

CLAIM LIMITATION OF '193

TEACHING IN REFERENCE

layers are fastened together by stitching "stacked relationship with one another and fastened together and to the top panel 62 using a plurality of fasteners 38 such as staples" column 3, lines 20-22 (Morris '095)

Claim 13 in light of Morris '095 in view of any of Neumann, Gibbs '690 and Gibbs '396

CLAIM LIMITATION OF '193

TEACHING IN REFERENCE

layers are fastened together by fasteners selected from the group consisting of staples, glue, hot air welding, stitching, ultrasonic welding, infrared bonding, and any combination thereof "stacked relationship with one another and fastened together and to the top panel 62 using a plurality of fasteners 38 such as staples" column 3, lines 20-22 (Morris '095); see also Figures 5 and 6 in which layers of vent part 12 are fastened together by fastener 38, shown as a staple

Claim 14

Claim 14 is anticipated by each of Neumann, Gibbs '690, and Gibbs '396, as discussed above. Alternatively, Claim 14 is obvious under 35 U.S.C. § 103, in light of Morris '095, taken in view of any of: (i) Neumann; (ii) Gibbs '690; and (iii) Gibbs '396.

Claim 14 and novelty are discussed above in view of Neumann, Gibbs '690, and Gibbs '396. Each of the limitations found in Claim 14 are found in Morris '095, except for the use of the structures as roof battens in a method for assembling a tile roof. Those additional aspects of Claim 14 relating to a method of installing a tile on a roof with a slope by fixing first and second battens on a roof such that longitudinal axes of the first and second battens are generally parallel and extend generally horizontally to the roof slope and then fixing tile atop the first and second battens, are all disclosed by each of Neumann, Gibbs '690 and Gibbs '396, and, additionally, are conventional steps used for tile roofs produced using battens.

The motivation to use the roof structures of Morris '095 in the method of Claim 14 is discussed above in regard to Claim 1. The advantages of ventilation and drainage from battens having transverse apertures is amply demonstrated by each of Neumann, Gibbs '690, and Gibbs '396. Morris '095 describes "ridge cap roof ventilators" with similar transverse air spaces for use

in ventilation. At the time of the filing of the '193 Patent, it would have been obvious to one skilled in the art to adapt and use segments of the roof ventilators of Morris '095 in a method for installing tile on a roof, as the similar method was otherwise disclosed and shown to be successful in any of Neumann, Gibbs '690, and Gibbs '396.

Claim 15

Claim 15 is anticipated by each of Neumann, Gibbs '690, and Gibbs '396, as discussed above. Alternatively, Claim 15 is obvious under 35 U.S.C. § 103, in light of Morris '095, taken in view of any of: (i) Neumann; (ii) Gibbs '690; and (iii) Gibbs '396.

Neumann, Gibbs '690 and Gibbs '396 each disclose battens with multiple plies or layers, providing the functions of both structural support and drainage. In each case the very similar structure and use of the battens to the ventilator sections 12 and 14 of the roof ventilator of Morris '095 provides ample motivation and expectation of success for using the segments of the Morris '095 roof ventilator as roof battens.

Claims 16-20

Claims 16 through 20 each depend, either directly or indirectly, from Claim 15. Each of the additional elements of Claims 16-20 are disclosed in Morris '095.

Morris '095 describes "ridge cap roof ventilators" that are manufactured by the same process as the battens of the '193 Patent. Each of the limitations recited in Claims 16 to 20 are common to Morris '095 and the '193 Patent.

At the time of filing the '193 Patent, it would have been obvious to one skilled in the art that sections 12 and 14 of the roof ventilator of Morris '095 could used as roof battens, given the similarity in structure and function the battens of Neumann, Gibbs '690, and Gibbs '396. Given the teaching of the prior art battens, there was a reasonable expectation of success for using ventilator sections made by the methods disclosed by Morris '095 as battens with transverse drain holes, as disclosed by Neumann, Gibbs '690, and Gibbs '396.

The following charts show where the limitations of Claims 16-20 can be found in Morris '095.

Claim 16 in light of Morris '095 in view of any of Neumann, Gibbs '690, and Gibbs '396

CLAIM LIMITATION OF '193

TEACHING IN REFERENCE

comprise a plurality of layers

"a plurality of equal width and length panels are placed in parallel and aligned stacked relationship with one another"; column 3, lines 18-21 (Morris '095)

Claim 17 in light of Morris '095 in view of any of Neumann, Gibbs '690 and Gibbs '396

CLAIM LIMITATION OF '193

TEACHING IN REFERENCE

layers further comprise means for fixing said layers in a stacked relationship

"stacked relationship with one another and fastened together and to the top panel 62 using a plurality of fasteners 38 such as staples" column 3, lines 20-22 (Morris '095)

Claim 18 in light of Morris '095 in view of any of Neumann, Gibbs '690 and Gibbs '396

CLAIM LIMITATION OF '193

TEACHING IN REFERENCE

fixing means includes stitching

"stacked relationship with one another and fastened together and to the top panel 62 using a plurality of fasteners 38 such as staples" column 3, lines 20-22 (Morris '095)

Claim 19 in light of Morris '095 in view of any of Neumann, Gibbs '690 and Gibbs '396

CLAIM LIMITATION OF '193

TEACHING IN REFERENCE

fixing means is selected from the group consisting of staples, glue, hot air welding, stitching, ultrasonic welding, infrared bonding, and any combination thereof

"stacked relationship with one another and fastened together and to the top panel 62 using a plurality of fasteners 38 such as staples" column 3, lines 20-22 (Morris '095); see also Figures 5 and 6 in which layers of vent part 12 are fastened together by fastener 38, shown as a staple

Claim 20 in light of Morris '095 in view of any of Neumann, Gibbs '690 and Gibbs '396

CLAIM LIMITATION OF '193

TEACHING IN REFERENCE

comprise a plurality of hingably-connected layers

"fabricated from pleated or hingedly interconnected rectangular panels having equal or progressive widths", column 3, lines 14-15 (Morris '095)

4. Invalidity under 35 U.S.C. §102(b) in view of Morris '095

Claim 21

Claim 21 is anticipated by Morris '095.

Most of the terms in Claim 21 may be given their ordinary and accustomed meaning or have been interpreted in the discussion of Claims 1 and 2, above. The meaning of the spacer limitation is discussed above.

In the examiner's statement of reasons for indication of allowable subject matter for Claim 21 and Claim 22, it was noted that the "...prior art fails to teach or suggest spacers with

layers that are fastened together by stitching", (page 3 of the Office Action mailed February 14, 2001). Claim 11 in the original application became the basis for issued Claims 21 and 22 in the '193 Patent.

Morris '095 discloses the use of "a plurality of fasteners 38 such as staples", column 3, lines 20-22 (see also Figures 5 and 6 in which layers of vent part 12 are fastened together by fastener 38). Stitching is a known equivalent fastening means to stapling for assembling stacked materials, and is particularly well known to the art of laminated material construction.

Dahlquist, issued April 23, 1996, discloses a system for producing folded inserts or displays that requires fastening multiple layers of material together. As seen in the paragraph spanning columns 7 and 8, stapling and stitching are interchangeable means for securing stacked materials:

Insert 46 can also be "saddle-bound" into a magazine as shown in FIG. 14. In this case, insert 46' is stapled or stitched within the magazine by stapling or stitching through adjacent page (or pages) 74 and binding member 58' at location ZZ with a staple 76. Binding insert 46' in this manner permits perforation lines 60' and 62' to be located closer to the centerfold 84 of the magazine and permits insert 46' to bear a continuous printed image across the centerfold 84 of insert 46' if desired.

Moorman issued on November 28, 1995, and also teaches that stapling and stitching are known alternatives for use in connecting layers of corrugated material. See, column 6, line 35-48.

No references disclosing the use of stitching and stapling for assembling layers or corrugated material were cited in prosecution of the '193 Patent. Taking recognition of the teachings in the art that stapling and stitching are equivalents for securing stacked materials, and that the "fasteners" of Morris '095 encompass all manner of fastening technology known to the art, including both the exemplified stapling and the equivalent stitching, Morris '095 discloses each and every element of Claim 21, as shown in the chart below.

This view is consistent with the disclosure of the '193 Patent, where stitching and stapling are described in the Summary as many alternative fastening means "known to the art":

The layers, when assembled in a stacked relationship, may be fastened together by stitching, staples, glue, hot air welding, ultrasonic welding, infrared bonding, other methods known to the art, or any combination thereof.

Column 2, lines 10-15.

No distinct advantage of stitching is noted in the summary or later in the description of the '193 Patent, which only provides at column 3, lines 4-11:

While one or more layers 34 are contemplated to be within the scope of this invention, if a plurality of layers 34 are present, these layers may be stacked and fixed to each other by such means as stitching 38. However, other fastening means which may be used include hot air welding (or other fastening means using thermal energy), ultrasonic welding, infrared bonding, staples, glue, or other methods known to the art.

For all of these reasons, the fasteners of Morris '095 anticipate the use of any of the listed fastening means of the '193 Patent, including stitching.

Claim 21 in View of Morris '095

CLAIM LIMITATION OF '193

TEACHING IN REFERENCE

A spacer

Vent part 12 (Morris '095)

operatively disposable between a roof decking and an exterior roof material and comprising

Vent part 12 is situated between roof decking 22, 24 and exterior roof material (see Figure 6). "Once the line of roof ventilators is installed, they are overlaid with shingles, tar paper, or other roofing materials." Column 1, lines 41-43 (Morris '095)

a plurality of stacked layers,

See stacked rectangular panels of vent part 12 in Figures 4, 6 and 7 (Morris '095)

each layer comprising a generally planar first ply

See planar ply 30 of Figure 9 (Morris '095)

and a second ply cooperating with the first ply to define a multiplicity of passages,

See Figure 9 (Morris '095) showing a second convoluted intermediate ply 34 cooperates with planar ply 30 to form air spaces. See also column 2, lines 59-66

the passages extending generally transversely to a longitudinal axis of the spacer,

See Figure 9 (Morris '095) (also column 2, lines 59-66)

the layers fastened together by stitching,

"stacked relationship with one another and fastened together and to the top panel 62 using a plurality of fasteners 38 such as staples" column 3, lines 20-22 (Morris '095; see also Figures 5 and 6 in which layers of vent part 12 are fastened together by fastener 38

adjacent layers connected by a hingeline extending generally parallel to the spacer longitudinal axis.

"The vent parts 12, 14 of the roof ventilator 10 may be fabricated from pleated or hingedly interconnected rectangular panels having equal or progressive widths using either a "slit-scored" or "nick-scored" technique as discussed in Fitterman '813. and Kasner '041 patents"; column 3, lines 13-18 (Morris '095)

5. Invalidity under 35 U.S.C. §103 in view of Morris '095 taken with either of Moorman and Dahlquist

Claim 21

All of the limitations of Claim 21 may be given their ordinary and accustomed meaning or have been interpreted in the discussion of Claims 1 and 2, above.

Each of the elements of Claim 21 is disclosed in Morris '095, as discussed above and summarized in the above panel. Morris '095 discloses the use of fasteners to secure the layers of the roof ventilator together, with staples being exemplified in the specification. The '193 Patent recites the use of stitching as one of several means, including staples, that can be used to secure layers of the spacer together.

At the time of the filing of the '193 Patent, it would have been obvious to one of ordinary skill in the art to modify the teachings of Morris '095 with regard to the choice of fasteners used to secure the layers of the spacer. Moorman and Dahlquist each teach the use of the equivalent stitching in forming layers of material into a secure layered structure, and provided the necessary motivation to try stitching in the place of the staple fasteners of Morris '095, and the skilled artisan would have had a reasonable expectation of success for producing spacers made by the methods disclosed by Morris '095 with stitching, as disclosed by Moorman and Dahlquist.

6. Invalidity under 35 U.S.C. §102(a) in view of Morris '817

Morris '817 was filed on January 2, 1998 and issued on September 7, 1999. The '193 Patent was filed on December 16, 1999 and issued on March 19, 2002. Although the '193 Patent claims priority to Provisional Application No. 60/112,597, filed December 17, 1998, the '193 Patent contains new matter not disclosed in the provisional application.

As to that new matter, the Patentee is not entitled to the filing date of the provisional application. In particular, Claim 22 recites "a spacer...comprising a plurality of stacked, completely separated layers..." This limitation was not disclosed in the provisional application but appears for the first time in the '193 Patent at column 3, lines 60-62 and in Claim 22. Accordingly, Claim 22 is only entitled to the actual filing date of the '193 Patent; namely, December 16, 1999. Therefore, Morris '817 is available as § 102(a) prior art against Claim 22 of the '193 Patent, as Morris '817 was granted before the actual filing date (for purposes of Claim 22) of the '193 Patent.

Claim 22

All of the limitations of Claim 22 may be given their ordinary and accustomed meaning or have been interpreted in the discussion of Claims 1, 2 and 21, above.

Each of the elements of claim 22 is disclosed in Morris '817. As discussed above for Claim 21, the use of stitching as an equivalent fastening means to staples is well known to the art.

Morris '817 discloses a spacer where layers are held together by "staples or equivalent fastening means" (column 8, lines 46-49). Figure 5 depicts the location and use of the fastening means 268 in securing completely separated layers together. As discussed above, stitching is an equivalent fastening means to staples for securing corrugated or laminated materials together.

Claim 22 in View of Morris '817

CLAIM LIMITATION OF '193

TEACHING IN REFERENCE

A spacer	Lateral vent 112, which provides a space between roof decking 56 and roofing materials 76; i.e., a spacer. See Figures 1, 2 and 15.
operatively disposable between a roof decking and an exterior roof material and comprising	Lateral vent 112 is situated between roof decking 56 and exterior roof material 76. See Figures 1, 2, and 15.
a plurality of stacked, completely separated layers	See Figure 5 and separated layers 160-162. See Figure 4 and the related description at column 8, lines 44-46: "[T]op panel 110 and vent panels 160-162 may be defined by completely severing vent panels 160-162 from unitary sheet 260.
fastened together by stitching,	See Figure 5 and fastening means 268. Also, column 8, lines 46-49: "Once severed, vent panels 160-162 may be stacked beneath top panel 110 and secured thereto by means of fasteners 268 such as staples or equivalent fastening means..." Stitching is an equivalent fastening means.
each layer comprising a generally planar first ply	Vent panels 160-162 include a generally planar first ply as depicted in the figures: first ply is element 220 in Figure 9, element 240 in Figure 10 and element 204 in Figure 11. Also, see column 7, lines 3-5: "Figure 10 depicts a two-ply material 236 as still another alternate embodiment of the weather proof material. Two-ply material 236 includes planar ply 240..."
and a second ply cooperating with the first ply to define a multiplicity of passages,	Vent panels include a second ply that, along with the first ply, defines a plurality of passages, as shown in the figures. Second ply is element 228 in Figure 9, element 244 in Figure 10 and element 212 in Figure 11. Passages are element 232 in Figure 9, element 144 in Figure 10, and element 144 in Figure 11. Also, see column 7, lines 6-8 as to Figure 10: "Planar ply 240 and convoluted ply 244 are joined together such that another multiplicity of air passages 144 is defined therebetween."
the passages extending generally transversely to a longitudinal axis of the spacer.	See Figures 9, 10 and 11.

7. Invalidity under 35 U.S.C. §103 in view of Morris '817 taken with either of Moorman and Dahlquist

Claim 22

All of the limitations of Claim 22 may be given their ordinary and accustomed meaning or have been interpreted in the discussion of Claims 1, 2 and 21, above.

Each of the elements of claim 22 is disclosed in Morris '817, as discussed above and summarized in the above panel.

As discussed above for Claim 21, at the time of the filing of the '193 Patent, it would have been obvious to one of ordinary skill in the art to modify the teachings of Morris '817 with regard to the use of fastening means to secure the layers of the spacer, using the equivalent stitching, as successfully taught by Moorman and Dahlquist.

VI. Conclusion

This request for *ex parte* reexamination is made in view of newly presented roof batten prior art not cited in the prosecution of the '193 Patent. Numerous of the prior art patents or printed publications disclose roof battens that anticipate claims of the '193 Patent under various provisions of 35 U.S.C. § 102 and 35 U.S.C. § 103. The pertinence and manner of applying the prior art to the claims has been provided above.

Of particular pertinence is the fact that no patent or printed publication reflecting the general state of the roof batten prior art was considered in the prosecution of the '193 Patent, rather, only non-analogous art relating to roof ridge ventilation was made of record.

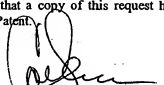
As the newly presented roof batten patents and printed publications clearly have a bearing on the patentability of the claims of the '193 Patent, reexamination of the '193 Patent is requested under the inter partes rules established pursuant to 35 U.S.C. §§ 301-307 and 37 CFR § 1.510, *et. seq.*

A copy of this request has been served by Express Mail in its entirety on the patent owner at the address as provided for in 37 CFR § 1.33(c), in that a copy of this request has been directed to the last attorney or agent of record for the '193 Patent.

Respectfully submitted,

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